No. 14970

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF.

ARTHUR N. GREENBERG,
1200 C. C. Chapman Building,
756 South Broadway,
Los Angeles 14, California,
Attorney for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14970

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF.

The statement of the case in Appellant's Opening Brief is incomplete. Appellee hereby restates the facts. All emphasis in this brief is added.

Statement of the Case.

At the time of the accident out of which this action arose, September 5, 1953, Appellee was a gardener and Appellant owned a dump yard. Appellee paid an agreed amount of money to Appellant for right to dispose of refuse in Appellant's dump yard. [Tr. p. 15.]

Appellant had excavated a pit in his dump yard in which he parked a large stake truck. The pit was bordered on three sides by a cement retaining wall, the top of which extended approximately one foot above the ground. The border of the cement retaining wall was approximately 18 inches wide. When the truck was parked in the pit, the

sides of the truck extended approximately two feet above the top of the retaining wall and there was a distance of 12 to 18 inches between the sides of the truck and the sides of the retaining wall.

Prior to September 5, 1953, a tractor had damaged Appellant's truck, breaking the metal band surrounding the bed of the truck. After said damage to Appellant's truck, a jagged metal hook, between 4 and 5 inches long and between 2 and 3 inches wide, extended outward and upward from the outside edge of the bed of the truck. [Tr. pp. 47, 106.]

Both Appellant and at least one of his employees knew of the protruding metal hook at the time of said damage and thereafter. [Tr. pp. 92, 105 and Pltf. Ex. 4.] Prior to Appellee's accident, Appellant's employee had slipped from the cement edge surrounding the pit, and had observed another person slip therefrom. [Tr. pp. 110, 111.]

On the day of the accident, Appellee had entered Appellant's dump yard for the purpose of disposing of refuse. As was customary, Appellee stood on the top of the cement retaining wall while throwing his refuse into Appellant's truck which was backed into the pit. Appellee threw his first bundle of trash toward the middle of the truck. No difficulty was encountered. Appellee then threw a second bundle of trash toward the rear of the truck. The second bundle was not as heavy as the first bundle. [Tr. pp. 85, 86.]

At no time while disposing of his trash did Appellee see the protruding metal hook at the base of the truck which was several feet below the top of the retaining wall. [Tr. p. 46.] Appellant had not told Appellee about the damage to his truck nor about the protruding metal hook. [Tr. p. 93.]

As Appellee attempted to dispose of his second load of trash, he slipped on refuse on top of the cement edge of the retaining wall and fell between the truck and the

pit. As he fell, the protruding metal hook impaled Appellee's right leg and caused the injury out of which this action arose. [Tr. pp. 46, 105.]

The only injury sustained by Appellee was that caused by the impaling of his right leg on the metal hook. There was no injury caused by any other part of the truck or by the pit. [Tr. pp. 70-77.]

Based upon the above facts, the Trial Court found as follows:

1. That other than said metal hook, the sides of said truck did not contain protruding objects, except for small sized bolt heads and nuts. [Finding 7, Tr. p. 28.]

2. That Appellee had no knowledge of said metal hook; that Appellee could not see and could not have seen said projecting metal hook from the top of the retaining wall; and that Appellee was not warned of said hazard by Appellant. [Finding 9, Tr. p. 29.]

3. That the hazard of being impaled upon a metal hook was not known to Appellee and could not have been reasonably foreseen by him. [Finding 8, p. 29.]

4. That the hazard of persons in the position of Appellee of being impaled upon said metal hook was known to Appellant and was reasonably foreseeable by him. [Finding 8, Tr. p. 29.]

After having so found, the Trial Court made the following Conclusions of Law:

1. That Appellee was a business guest and business invitee of Appellant. [Tr. p. 31.]

2. That Appellant owed Appellee the duty of due care, the duty to warn Appellee of hidden danger and the duty to warn Appellee of the hazard of said projecting metal hook. [Tr. p. 31.]

3. That Appellant should have reasonably foreseen that Appellee and others similarly using said dump might

fall into said pit and receive serious injury by reason of said projecting metal hook. [Tr. p. 31.]

4. That Appellee was not contributorily negligent with respect to the hazard created by said projecting metal hook known to Appellant but unknown to Appellee and unforeseeable by Appellee in the exercise of reasonable care. [Tr. p. 31.]

Province of Court of Appeals.

Where the evidence is conflicting, or, if undisputed, the facts are such that fair minded men may draw different conclusions, the determination of negligence and contributory negligence are questions for the trier of fact.

> *Douglass v. Douglass,* 1955, 130 Cal. App. 2d 609, 279 P. 2d 556;
>
> *United States v. Douglas Aircraft Co.,* 169 Fed. 2d 755, 757 (9th Cir. 1948).

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."
>
> Rule 52 (a), Fed. Rules of Civil Procedure, 28 U. S. C. A.

In *Glens Falls Indemnity Co. v. United States,* 229 Fed. 2d 370 (9th Cir. 1955), this Court stated on page 373 as follows:

> "Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. F. R. Civ. P. Rule 52 (a), 28 U. S. C. A. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous."

ARGUMENT.

I.

The Evidence Is Clearly Sufficient to Sustain the Finding That Appellant Was Negligent and That Appellant's Negligence Was the Proximate Cause of Appellee's Injury.

It is conceded that Appellee was a business invitee upon Appellant's property.

Appellee, as an invitee, had the right to assume that Appellant's premises were reasonably safe.

> *Popejoy v. Hannon,* 1951, 37 Cal. 2d 159, 171, 231 P. 2d 484.

Appellant is liable for failure to warn his invitees of a dangerous condition upon his premises, the existence of which Appellant knew or should have known.

> *Popejoy v. Hannon, supra;*
>
> *Raber v. Tumin,* 1951, 36 Cal. 2d 654, 226 P. 2d 574;
>
> *Blumberg v. M & T Inc.*, 1949, 34 Cal. 2d 226, 209 P. 2d 1;
>
> *Douglass v. Douglass, supra;*
>
> *Powell v. Jones,* 1955, 133 Cal. App. 2d 601, 284 P. 2d 856.

In *Powell v. Jones, supra,* the Court stated on page 606:

> "A possessor of land owes to an invitee the duty of exercising ordinary care to keep his premises in a reasonably safe condition; and he will be liable for bodily harm, in the absence of an adequate warning, caused an invitee by a dangerous condition in the premises 'if he knows or should know of the

> danger which he has no basis for believing that the invitee will discover.' "

Appellant cites cases on pages 13 and 14 of his Opening Brief in support of the contention that an invitor has no duty to warn an invitee of obvious defects. In *Anderson v. Western Pacific R.R. Co.,* 1936, 17 Cal. App. 2d 244, 61 P. 2d 1209, cited by Appellant, which did not involve an invitee, the defect was obvious. The Court stated on page 249 as follows :

> "On the contrary, the evidence without conflict proves that there was no concealment or trap whatever."

With the general proposition that an invitor owes no duty to warn of obvious defects, Appellee has no quarrel.

However, in the instant case, the protruding metal hook was *not* obvious, *but was instead concealed and hidden from discovery by Appellee while he was standing on top of the walls of the pit.* It was with respect to this hazard that Appellant had the duty to warn Appellee. The Trial Court so found.

On page 7 of his Opening Brief, Appellant argues that the evidence was insufficient to justify the conclusion that he could have anticipated that anyone would fall between the truck and pit and be injured by the protruding metal hook.

However, appellant's employee, whose duty it was to keep clean the area around the pit, had previously observed persons slipping from the top of the retaining wall. [Tr. pp. 110, 111.]

This knowledge of said employee that persons had slipped from the top of the pit was imputed to Appellant.

Maron v. Swig, 1952, 115 Cal. App. 2d 87, 251 P. 2d 770;

Cooke v. Mesmer, 1912, 164 Cal. 332, 128 Pac. 917;

California Civil Code, Sec. 2332.

Moreover, the mere fact that similar accidents may not have been brought to Appellant's attention did not necessarily make his conduct innocent.

Alaska Freight Lines v. Harry, 220 F. 2d 272, 275-276 (9th Cir. 1955);

Teale v. Southern Pacific Rwy. Co., 1913, 20 Cal. App. 570, 129 Pac. 949;

Rocca v. Tuolumne County Elec. Power & Light Co., 1926, 76 Cal. App. 569, 245 Pac. 468;

Cox v. Central California Traction Co., 1927, 85 Cal. App. 596, 259 Pac. 987.

In the *Alaska Freight Lines* case, this Court stated on page 276 as follows:

> ". . . Merely because a particular accident has not happened before does not render it of that class which may not be 'reasonably anticipated'; for if, in the conduct of a certain business it should be known that unusual or uncommon danger . . . must necessarily coexist with certain conditions, responsibility attaches for a failure to control such conditions."

Whether it was foreseeable that injury would result to an invitee by virtue of the hazard of the protruding metal hook was a question of fact for the Trial Court to determine. Appellant knew of the existence of the metal hook. Appellant knew that persons had slipped from the top of the pit while disposing of refuse. Appellant knew

or should have known that persons disposing of trash into the truck parked in the pit could not discover the existence of the metal hook. From these facts the Trial Court could have inferred that Appellant should have foreseen risk of injury from the hazard of the protruding metal hook. Thus, the evidence clearly supports the Trial Court's finding of negligence.

Furthermore, it was for the Trial Court to determine proximate cause.

> *Orr v. Southern Pacific Co.,* 226 F. 2d 841, 843 (9th Cir. 1955).

In the instant case, the only injury sustained by plaintiff was caused by being impaled on the protruding metal hook. No other part of the truck or pit caused injury. [Tr. pp. 70-77.] Therefore, the trial Court's finding that Appellant's negligence was the proximate cause of Appellee's injury is also clearly supported by the evidence.

II.

The Evidence Is Clearly Sufficient to Sustain the Finding That Appellee Was Not Guilty of Contributory Negligence.

The evidence disclosed and the Trial Court found that Appellee was injured by being impaled upon the protruding metal hook, that the hazard of said metal hook was unforeseen and unforseeable by Appellee and that with respect to said hazard Appellee was not contributorily negligent.

A plaintiff is not guilty of contributory negligence with respect to injuries caused by an unforeseen and unforeseeable hazard.

> *Hawthorne v. Gunn,* 1932, 123 Cal. App. 452, 11 P. 2d 411;

James v. Pennsylvania R.R. Co., 101 Fed. Supp. 241 (W. D. Pa. 1941) Aff'd 196, F. 2d 1021 (3rd Cir. 1952);

Kinderavich v. Palmer, 1940, 127 Conn. 85, 15 A. 2d 83;

Hassett v. Palmer, 1940, 126 Conn. 468, 12 A. 2d 646;

Cosgrove v. Shusterman, 1942, 129 Conn. 1, 26 A. 2d 471;

Kryger v. Panaszy, 1937, 123 Conn. 353, 195 Atl. 795;

Restatement of Torts, Secs. 281, 468;

Prosser on Torts, 1941, pp. 396, 397.

This is the application of the doctrine of foreseeability as an element of negligence and contributory negligence.

See:

Alaska Freight Lines v. Harry, 220 F. 2d 272 (9th Cir. 1955).

Restatement of Torts, Sec. 281 sets forth the elements of a cause of action for negligence. Comment e. discusses foreseeability as follows:

> "Risk of particular harm. Certain forms of conduct are negligent because they tend to subject certain interests of another to a particular hazard or type of hazard or to a limited number of hazards of a definite character. If so, the actor's negligence lies in his subjecting the other to the particular hazard and he is liable only for such harm as results from the other's exposure thereto."

The same rule is applicable in determining whether a plaintiff is contributorily negligent. Restatement of Torts, Section 468 sets forth the rule as follows:

> *"The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery unless the plaintiff's harm results from a hazard because of which his conduct was negligent."*

Comment a. states:

> "The rule stated in this Section applies to the plaintiff's responsibility for his own carelessness, the same rule which is applied in Comment e. of Sec. 281, to the determination of the responsibility of a negligent defendant for harm resulting to a plaintiff. *Therefore, one whose act is negligent only because it should be recognized as likely to subject him to a particular hazard is not, as plaintiff, barred from recovery for an injury which results otherwise than from his exposure to this hazard."*

In *James v. Pennsylvania R.R. Co., supra,* plaintiff was advised by his doctors to stop working as a sandblaster because of danger of sinus injury. Plaintiff disregarded the advice and subsequently contracted silicosis. The Court held that, under the circumstances, plaintiff could not have reasonably foreseen the risk of contracting silicosis and therefore was not contributorily negligent, stating on page 242 as follows:

> "I perceive no error in refusing to charge that it was negligence for plaintiff to engage in sandblasting after receiving medical advice not to do so . . . the medical advice was based upon a diagnosis of sinusitis. The disease on account of which plaintiff here seeks recovery was silicosis, as to which the doctors did not purport to counsel plaintiff. Dis-

obedience of their recommendations would not create in the mind of a reasonably prudent man the risk of contracting silicosis. See Restatement of Torts, 1934 Ed., Sec. 468, Comment a."

In *Kinderavich v. Palmer, supra,* the Court stated on page 89 as follows:

". . . an act or omission of a plaintiff will not debar him from a recovery where it did not constitute negligence as regards the hazard from which his injuries resulted."

Prosser states on pages 396 and 397 as follows:

"The accepted view now is that *the plaintiff's failure to exercise reasonable care for his own safety does not bar his recovery unless his injury results from the particular risk to which his conduct has exposed him.* In a leading Connecticut case, in which a workman violated instructions not to work on the unguarded end of a slippery platform, and was injured by the fall of a brick wall, it was held that he might recover, since his negligence did not extend to such a risk. Upon the same basis, it has been held that a passenger riding upon the platform of a street car is not negligent with respect to a collision, nor is an automobile driver who parks near a fire hydrant negligent as to any vehicle which may drive into him, except a fire engine, or one who drives at excessive speed negligent as to a tree which falls on him."

In the instant case, the hazard of the projecting metal hook was unknown and unforeseeable by Appellee. Therefore, with respect to said hazard, Appellee was not contributorily negligent.

Had Appellee's injuries been caused by another hazard, then with respect to that hazard Appellee might have

been contributorily negligent. However, because Appellee's injuries were caused by the unforseeeable metal hook, there is no need to speculate as to other possibilities.

Appellant attempts to dismiss the rule of foreseeability in three ways:

First: Appellant argues on page 20 of his Opening Brief that Appellee "may well have been contributorily negligent with respect to his conduct in permitting himself to slip or fall from the top of the cement wall."

However, this argument overlooks the fact that conduct can be negligent *only with relation to a particular hazard.* In the instant case, the hazard was the protruding metal hook. With respect to this hazard, the Trial Court found that Appellee was not contributorily negligent.

There is no such thing as negligence in the air. As stated in *Palsgraf v. Long Island R.R. Co.,* 1928, 248 N. Y. 339, 162 N. E. 99:

> "We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act, and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers only, because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. *The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation*; it is risk to another or to others within the range of apprehension. . . ."
>
> *"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."*

Accordingly, it was for the Trial Court to determine whether Appellee's conduct in permitting himself to slip from the top of the cement wall was contributory negligence with relation to the hazard of the protruding metal hook.

Second: Appellant states on page 22 of his Opening Brief that: "It is not necessary that the precise injury or hazard must have been in the mind of Appellee . . . to establish contributory negligence."

Appellant has confused the question of foreseeability of *injury* with foreseeability of *hazard*. There is no issue in the instant case with respect to the former. Moreover, Appellant cites no authority in support of his novel proposition that foreseeability of hazard is not an element of negligence or contributory negligence.

By this argument, Appellant has placed himself squarely on the horns of a dilemma. On one hand, he urges that foreseeability of hazard *is not* an element of contributory negligence. On the other hand, he argues that foreseeability of hazard *is* an element of negligence. Appellant states on page 7 of his Opening Brief that:

> "There is no evidence to justify the conclusion that the Appellant could possibly have *anticipated* that anybody using the pit would fall in the small space between the edge of the pit and the side of the truck in such a manner as to come in contact with the small piece of metal which was protruding from the side of the truck. This tiny area was not one in which the Appellant *could reasonably have anticipated* that any person would fall or otherwise be involved."

In truth, an essential element of both negligence and contributory negligence is whether the hazard causing the

injury was foreseeable. Appellant should have foreseen that persons in the position of Appellee might sustain injury by virtue of the projecting metal hook and thus was negligent. On the other hand, the hazard of the metal hook was unforeseeable to Appellee. Therefore, with respect to said hazard, Appellee's conduct did not constitute contributory negligence.

Finally: Appellant argues on page 16 of his opening brief that Appellee's conduct "was the sole proximate cause of his injuries."

No Question of Proximate Cause With Respect to Appellee's Conduct Exists in the Instant Case.

In determining the right to recover for negligence, the Trial Court must determine whether plaintiff was guilty of contributory negligence. Only if plaintiff was so guilty, must the Trial Court find whether plaintiff's contributory negligence was a proximate cause of his injury.

If plaintiff is not guilty of contributory negligence, then no question of proximate cause arises and his right to recover is not barred.

Palsgraf v. Long Island R.R. Co., supra;
Cosgrove v. Shusterman, supra;
Kinderavich v. Palmer, supra;
California Jury Instructions, Civil, 4th Ed., 1956, No. 113.

In the *Palsgraf* case, Justice Cardozo stated as follows:

> "The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. *If there is no tort to be redressed, there is no occa-*

sion to consider what damage might be recovered if there were a finding of a tort."

Prosser on Torts states as follows on page 397:

"Such cases frequently say that the plaintiff's negligence is not the 'proximate cause' of his own damage. It is, of course, quite possible that his conduct may not have been a substantial contributing factor at all, where the harm would have occurred even if he had exercised proper care. But in the usual case the causal connection is clear and beyond dispute, and no problem of causation is involved. *What is meant is that the plaintiff's conduct has not exposed him to any foreseeable risk of the particular injury through the defendant's negligence, and therefore is not available as a defense."*

California Jury Instructions, Civil, Fourth Edition, 1956, No. 113, sets forth the California rule that if the plaintiff is not contributorily negligent, no question of proximate causes exists as follows:

"The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative you have a second issue to determine, namely: Was that negligence a proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then must find on a third question:

"Was the plaintiff negligent?

"If you find that he was not, after having found in plaintiff's favor on the other two issues, you then

must fix the amount of plaintiff's damages and return a verdict in his favor.

"If you find that plaintiff was negligent, you must then determine a fourth issue, namely: Did that negligence contribute as a proximate cause of the injury of which the plaintiff here complains?"

Accordingly, no issue of proximate cause with relation to Appellee's conduct exists because the Trial Court found that Appellee was not guilty of contributory negligence.

Conclusion.

Appellant has placed himself in an untenable position. In the first half of his Opening Brief, he argues that he was not negligent because it was unforeseeable that injury would result from the hazard of the protruding metal hook. The Trial Court found that risk of injury was in fact foreseeable by Appellant, and therefore Appellant was negligent.

In the second half of his Opening Brief, Appellant argues that he is not liable because foreseeability of hazard is not to be considered in determining whether Appellee was contributorily negligent. The Court held, in accordance with the authorities cited herein and with the general law of negligence, that foreseeability is an element of contributory negligence and that Appellee was not guilty thereof because the hazard of the metal hook was unforeseeable by him.

Accordingly, the Trial Court's findings are supported by law and evidence and the judgment should be affirmed.

Respectfully submitted,

ARTHUR N. GREENBERG,
Attorney for Appellee.